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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 429

SEAWAY BEVERAGES, INC.,
Petitioner,

vs.

C. DOUGLAS DILLON, SECRETARY OF THE TREASURY OF THE UNITED STATES, DWIGHT E. AVIS, DIRECTOR OF ALCOHOL AND TOBACCO TAX DIVISION OF INTERNAL REVENUE SERVICE, AND THE UNITED STATES OF AMERICA,
Respondents.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

MANDEL L. ANIXTER,
ANDREW J. DELANEY,
ROBERT A. SPRECHER,
MICHAEL A. BILANDIC,
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THE SUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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Seaway Beverages, Inc. prays that this Court grant rehearing of its order of November 18, 1963, denying the petition for writ of certiorari, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the District of Columbia in the above-entitled case as prayed for in the petition filed September 3, 1963, herein.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT.

1. Mr. Justice Douglas was of the opinion that certiorari should be granted, and the Honorable Chief Justice Warren on November 20, 1963, stayed the issuance of the order denying the petition for certiorari pending the timely filing and disposition of a petition for rehearing.

2. On December 2, 1963, in his dissenting opinion, concurred in by Mr. Justice Douglas, in No. 275, *Chicago & Eastern Illinois Railroad Co. v. United States*, 32 U. S. Law Week 3202-3204, Mr. Justice Black complained strongly that he was unable to determine from the Interstate Commerce Commission's report in that case whether its ultimate conclusion was supported by substantial evidence, urged that such reports be understandable enough so that administrative actions may be reviewed, and concluded at page 3204:

> "The Commission apparently seeks to make a rubber stamp of any court reviewing its orders. I do not like that role."

Despite the fact that the hearing examiner in the present case made, the Assistant Regional Commissioner adopted, and the Director of the Alcohol and Tobacco Tax Division of Internal Revenue affirmed, findings (Findings 32 through 39, JA 451-2, set out in the petition for certiorari at pages 15-16 and the reply of the petitioner at pages 2-3) which make it utterly impossible to reach the ultimate finding and conclusion denying the permits, nevertheless the Court of Appeals concluded that "we perceive no basis for disturbing these findings and conclusions." The history of the Federal Alcohol Administration Act is one of continuous rubber-stamping by the courts of administrative actions under what is undeniably the broadest discretion ever conferred upon an administrative agency—the determination of what an applicant is "likely" to do. It is virtually impossible to find any judicial disturbance of an order under the Act, despite the fact that the Director controls the economic life and death of the members of a multi-billion dollar industry, despite the incongruity of the act which permits a felon to obtain a permit after 5 years but an "unlikely" person to be barred from a permit forever, and despite the important and abiding constitu-

tional questions which, in the present case, have been determined by the rubber-stamping of a finding of guilt by association. The administration of the Act in this case and throughout its history has been as Justice Prettyman in *Armour & Company* v. *Freeman*, 304 F. 2d 404 (C. A., D. C., 1962) at 411, said of another agency, "bureaucratic absolutism run wild."

Professor Davis has set forth seven situations which call for the "substitution of judicial for administrative judgment" and this case fits almost every category (4 Davis, Administrative Law, 1958, § 30.07, pages 232-3):

> ". . . Substitution of judicial for administrative judgment is often rather clearly desirable, especially when the statutory purpose is unclear, in many large categories of cases, including those involving problems which (1) transcend the single field of the particular agency, (2) call for interpretation of the common law, (3) are primarily problems of ethics or fairness of a common-law type, (4) are affected substantially by constitutional considerations, whether or not a constitutional issue is directly presented, (5) require analysis of legislative history, especially when political conflict is the essence and not legislative inquiry into technical understanding within the agency's field of specialization, (6) bring into question judge-made law previously developed in the course of statutory interpretation, and (7) impel the reviewing court to make a discretionary choice for any reason, explained or unexplained, to create or mold law as a guide for the agency and for affected parties."

3. The opinion of the Court of Appeals in the present case should not be permitted to stand "as a guide for the agency and for affected parties." The petitioner has set forth in detail (petition for certiorari pages 31-2) the completely erroneous portion of the opinion which was left uncorrected by the Court of Appeals although pointed

out in the petition for rehearing in that court. The government in its brief in opposition to the petition for certiorari did not attempt to justify or answer this gross error which remains in the opinion. Furthermore, the opinion did not speak to or rule upon the substantial issues raised, nor did it furnish any clarification of, legal analysis of, or judicial concepts in connection with, the provisions of the Federal Alcohol Administration Act. Now only this Court can erase that opinion and give rule and reason to an agency and affected parties so that all may exist under government by law rather than under unguided conclusions of man.

One of the landmark cases in the law, *Hickman* v. *Taylor*, 329 U. S. 495 would not exist if this Court did not on occasion review its denial of petitions for certiorari (327 U. S. 808, 328 U. S. 876). This case merits the review of this Court as Mr. Justice Douglas has hertofore noted.

CONCLUSION.

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that upon such rehearing a writ of certiorari issue to the Court of Appeals for the District of Columbia.

Respectfully submitted.

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CERTIFICATE OF COUNSEL.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

Counsel for Petitioner.